78. Discussion. Section 617(d) provides the Commission with broad discretion to grant waivers in the public interest. However, the 1992 Act prohibits the Commission from granting such waivers unless local franchise authority approval has been obtained, if such approval is required. Except with respect to MSO and small system transfers, we decline to establish specific waiver criteria applicable to public interest waivers. Instead the Commission will consider public interest waiver requests on a case-by-case basis. Such waiver requests must be filed pursuant to the special relief procedures established in Section 76.7 of the Commission's Rules. Although in most cases local approval is required prior to the consummation of a transfer, we conclude that the Commission may grant waivers in appropriate cases prior to the grant of such approval, provided such waivers are conditioned upon the grant of local transfer approval. Commission waivers issued in advance of local transfer approval will not become effective unless such approval is ultimately obtained and will in no way affect the discretion of local franchise authorities to decide such transfer requests. We conclude that the grant of such conditional waivers will enhance the speed and efficiency of the waiver process, without undermining the discretion of the local franchise authority to approve or disapprove a proposed transfer, especially where multiple franchise authority approvals are necessary.

79. The 1992 Act directs the Commission to grant waivers in cases of default, foreclosure and other financial distress. Such waiver requests should be filed pursuant to the special relief procedures established in Section 76.7. In cases of default, waiver applicants must establish an affirmative factual showing, supported by affidavits of a person or persons having personal knowledge that the cable operator is in default, other than a technical default, under the terms of a credit or loan agreement pursuant to which the cable operator is primarily liable. Waiver applicants should provide the Commission with copies of default notices or other documentation establishing the creditor's acknowledgment of such default. In cases of foreclosure, waiver applicants must establish an affirmative factual showing, supported by affidavits, that a foreclosure action has been initiated with respect to property affecting the ability of the cable operator to maintain cable service. Copies of foreclosure notices or other documentation establishing that a foreclosure action has been initiated should be submitted as evidence of such foreclosure. A cable operator may establish an affirmative showing of financial distress by submitting evidence, supported by affidavits, of the existence of financial distress. Indica of such financial distress may include, but shall not be limited to, evidence of a net operating loss or insufficient capital to maintain operations.[59] Audited financial statements including statements of cash flow or balance sheets should also be submitted to establish such financial distress.

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[59] We note that, in the broadcast context, financial distress sufficient to warrant a waiver of the one-year holding requirement was found where a licensee established that a transfer was in the public interest because of it was unable to obtain capital. Turner Communications Corp., 23 RR 2d 1046, 1047 (1972).

G. 120-day Limitation on Franchise Authority Consideration of Transfer Requests.

80. Notice. Section 617(e) of the Communications Act imposes a 120-day limitation on franchise authority consideration of transfer requests involving systems owned for three-years or more. If franchise authorities do not act on such transfer requests within 120 days, such requests are deemed to be granted. Section 617(e) contemplates that the Commission will adopt regulations establishing the information that must be submitted in connection with such transfer requests. The 120-day statutory period begins to run from the date a cable operator submits a transfer request to the franchise authority containing all information required by Commission regulations and the franchise agreement.

81. In the Notice we requested comment regarding the type of informational requirements the Commission should establish in connection with such transfer requests. We asked commenters to indicate the information necessary for franchise authorities to begin evaluating transfer requests. In this regard, we noted that our intention was to establish a minimum standard for such informational requirements and allow franchise authorities to request any additional information that may be necessary to evaluate a particular transfer.

82. Comments. Most cable commenters request that the Commission establish uniform rules regarding the information required to commence the 120-day review period, and clarify that the 120-day period is not tolled by additional information requests, not otherwise required by Commission rules, the franchise, or applicable local law. Cable commenters argue that such a limitation is necessary to ensure the efficacy of the 120-day statutory limitation. Cable commenters argue that such informational requirements should be limited to information necessary to establish the legal, technical and financial qualifications of the proposed transferee. Cable commenters also suggest that the Commission limit the ability of franchise authorities to request additional information, beyond the information required by Commission rules, the terms of the franchise, or applicable local law.

83. In contrast, franchise authorities argue that the FCC should confirm that local franchise authorities have broad authority to request all information necessary to determine whether a transfer is in the public interest. According to local authorities, the Commission's statutory mandate is to develop regulations to ensure that the franchise authority receives all information necessary to "begin" an evaluation of a transfer request. As a consequence, franchise authorities insist that they should not be limited in the types of information they can request. Finally, franchise authorities argue that the 120-day period should begin to run only after the franchise authority notifies the cable operator that it has received all information necessary to evaluate the proposed transfer.

84. Discussion. Under the 1992 Act, franchise authorities must approve or deny transfer requests involving systems owned for three years or more within 120 days, or such requests shall be deemed granted. The statutory

language contemplates that the Commission will establish regulations setting forth the information required to be submitted to local franchise authorities in order to commence the running of the 120-day period. Section 617(e) also indicates that the 120-day limitation and the Commission's informational requirements apply only to transfers of systems owned for three years or more, and only where local transfer approval is required under the franchise agreement.[60]

85. The informational requirements we adopt in response to this provision are limited to the information necessary to establish the legal, technical and financial qualifications of the proposed transferee and any information required by the franchise or applicable local law. In developing these informational requirements, we looked to the information required by the Commission in connection with transfer requests for broadcast licenses and CARS authorizations.[61] In this regard, the Commission has developed a standardized form to be used in connection with transfer requests for cable systems owned for three years or more. A copy of the FCC cable transfer form is attached as Appendix B to this Report and Order/Further Notice.

86. In addition to the information specifically solicited by the FCC Form, franchise authorities are permitted to request such additional information as is reasonably necessary to determine the qualifications of the proposed transferee. However, such requests for additional information, beyond the requirements of the franchise agreement or local law, will not toll or extend the 120-day period unless the cable operator and franchise authority otherwise agree to an extension of time as provided under the statute. Cable operators are required, however, to promptly respond to such requests by completely and accurately submitting all information reasonably requested by the franchise authority. We conclude that use of the Commission's standardized form in connection with the 120-day limitation will ensure that franchise authorities are provided with sufficient information to evaluate and render prompt decisions with respect to such transfer requests.

H. Blanket Waiver for Small System Operators

87. Notice. Commenters were asked in the Notice to address the

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60 Subsection (e) states that the 120-day limit on franchise authority consideration applies "[i]n the case of any sale or transfer of ownership of any cable system after thirty-six months following acquisition of such system." 47 U.S.C. § 537(e) (emphasis added). However, we do not believe that Congress intended to exclude from this provision transfers of cable systems after thirty-six months following initial construction, since the three-year holding period applies to transfers of cable systems during the thirty-six month period following "either the acquisition or initial construction" of such system. 47 U.S.C. § 537(a) (emphasis added).

61 See FCC Form 314 and 315 (broadcast assignment and transfer of control applications) and FCC Form 327 (CARS assignment and transfer of control application).

expected impact of the proposed anti-trafficking regulations on small entities as required by Section 603 of the Regulatory Flexibility Act of 1980.

88. Comments. The Coalition of Small System Operators ("Small System Coalition") strongly advocates the need for a blanket anti-trafficking waiver for systems with 1,000 subscribers or less. According to the Small System Coalition, such systems generally serve sparsely populated rural areas that would otherwise go unserved. Furthermore, the Small System Coalition argues that small systems, which are typically highly leveraged and operate close to the margins, are unlikely targets for profiteers. The Small System Coalition adds that operators of small systems will suffer great financial hardship if they are unable to transfer unprofitable systems or systems which are no longer geographically compatible with the cable operator's other systems.

89. The Small System Coalition further indicates that small system operators provide service in hundreds of scattered communities, each subject to independent franchise agreements and local regulation. According to the Small System Coalition, local transfer approval is not required in over 50% of these communities and thus anti-trafficking review would impose a new and substantial administrative burden on small system operators. Moreover, the Small System Coalition argues that the expense and administrative burden of obtaining individual waivers from the Commission would create undue hardship on small system's serving insignificant numbers of subscribers. Finally, the Small System Coalition asserts that the Commission has broad authority under Section 617(d) to grant a blanket anti-trafficking waiver for small systems if it finds that such a waiver would serve the public interest. No commenters opposed the grant of a blanket anti-trafficking waiver for small systems.

90. Discussion. The Commission is persuaded that a blanket anti-trafficking waiver for small systems will serve the public interest. First, we recognize that small systems serving rural areas with low population density are unlikely to be the subject of profiteering transactions. Second, we believe that application of the anti-trafficking rule to small systems would create significant costs and administrative burdens on small system operators and may deter expansion of cable service into sparsely populated rural areas. Third, consistent with the Regulatory Flexibility considerations, we are persuaded that the expense and delay of obtaining waivers in individual cases may be prohibitive for many small system operators. Fourth, we determine that such a blanket waiver will eliminate a significant number of waiver requests thereby reducing the administrative burden on the industry and the Commission, while affecting only a small number of cable subscribers.[62]

91. Moreover, Congress granted the Commission broad authority under

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[62] According to the Small System Coalition, there are approximately 5,878 systems serving less than 1000 subscribers. However, such systems account for only 3.6% of all cable subscribers nationwide.

Section 617(d) to grant waivers in the public interest. Since we believe that application of the anti-trafficking rule to small systems would create significant financial and administrative burdens on small system operators, we conclude that a blanket waiver for small systems furthers the public interest. Small systems will be defined for this purpose as any cable system serving 1000 subscribers or less.[63] This definition is consistent with Congress' definition of small systems under Section 3 of the 1992 Cable Act, which directs the Commission to develop appropriate regulations to reduce the administrative burdens of rate regulation on small systems.[64] Nevertheless, in order to comply with our statutory waiver authority, our blanket anti-trafficking waiver for small systems is contingent upon, and in no way affects local franchise authority consideration of such transfer requests, where such transfer approval is required. We also note that if the Commission receives complaints with respect to trafficking abuses by small system operators, the Commission may revoke the small system waiver in individual cases.

III. CROSS-OWNERSHIP RESTRICTIONS

A. Background

92. Section 11(a) of the 1992 Cable Act amends Section 613(a) of the Communications Act, to add a cable/MMDS and a cable/SMATV cross-ownership restriction.[65] Specifically, the 1992 Act provides that a cable operator may not hold an MMDS license in any portion of the franchise area served by the cable operator's cable system. Nor may a cable operator offer SMATV service "separate and apart from any franchised cable service" in any portion of the franchise area served by the cable operator's cable system.[66] The cross-ownership provision addresses Congress' concern that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public.[67] The Senate Committee also indicated that such cross-ownership rules were necessary to enhance competition and to further diversity, by preventing cable operator's from warehousing potential competition.[68]

93. Section 613 of the 1992 Act authorizes the Commission to waive the statutory cross-ownership requirements "to the extent the Commission

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[63] The Regulatory Flexibility Act of 1980 also supports this definition. 5 U.S.C. §§ 601-612.

[64] 47 U.S.C. § 543(i).

[65] 47 U.S.C. § 533(a)(2).

[66] Id.

[67] Senate Report at 46.

[68] Id. at 47.

determines is necessary to ensure all significant portions of a franchise area are able to obtain video programming."[69] Section 613 also directs the Commission to waive all cable/MMDs and cable/SMATV cross-ownership interests existing as of December 4, 1992, the effective date of the 1992 Cable Act.[70] When the Commission adopted the existing cable/MMDS cross-ownership rule, it specifically grandfathered all cable/MMDS cross-ownership interests that existed as of the effective date of these rules (February 8, 1990), and thus no additional cable/MMDS combinations will be grandfathered pursuant to Section 613 of the 1992 Act.[71] By contrast, all cable/SMATV cross-ownership interests existing as of December 4, 1992, shall be waived under the 1992 Act.[72]

94. Notice. In the Notice, we observed that the Commission has already adopted regulations implementing a cable/MMDS cross-ownership prohibition in the recently concluded Wireless Cable Proceeding.[73] We indicated that the fundamental purpose of that proceeding coincided with Congress' objective in enacting the statutory cross-ownership prohibition. We tentatively concluded that the recently adopted cable/MMDS cross-ownership restrictions (47 C.F.R. §21.912.) were consistent with and effectively implemented the statutory cable/MMDS cross-ownership prohibition. We suggested that these same rules and their implementing criteria may also be appropriate for the cross-ownership prohibitions as they relate to SMATV. Commenters were invited to address these tentative conclusions.

95. In the Notice, we also indicated that the Commission had considered and rejected the use of the broadcast attribution rules for purposes of its cable/MMDS cross-ownership provision. We further stated that we did not believe it was necessary or appropriate to reopen this issue as it pertains to MMDS (or SMATV) cross-ownership restrictions. With respect to the cable/SMATV cross-ownership restriction, we observed that the legislative history indicated that this provision was not intended to prevent the common ownership of a SMATV system that itself qualifies as a "cable system" under section 602(7)[74] of the Communications Act and a second separate stand-alone SMATV system.[75]

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69 47 U.S.C. § 533(a)(2)(B).

70 47 U.S.C. § 533(a)(2)(A).

71 47 C.F.R. § 21.912(f).

72 47 U.S.C. § 533(a)(2)(A).

73 Report and Order in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990); Order on Reconsideration in Gen. Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 (1991); Second Report and Order in Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991) ("Wireless Cable Proceeding").

74 47 U.S.C. § 522(7).

75 Senate Report at 81.

96. In addition, we noted that the 1992 Act permits the Commission to waive the statutory cross-ownership prohibition to the extent we determine that cross-ownership is necessary to ensure that all significant portions of a franchise area are able to obtain video programming. We requested comment on whether the existing public interest waiver standard for cable/MMDS cross-ownership was sufficient for this purpose, or whether we should adopt the procedures specified in Section 76.7 of the Commission's special relief rules for waiver requests arising under the statutory cross-ownership rules. We also requested comment on the proper means of enforcing the cross-ownership provision, and questioned whether the Commission should monitor ownership in this regard. With respect to enforcement, we suggested that the Commission should establish procedures for consideration of complaints, and asked commenters what procedures should be adopted to allow participation by all interested parties.

B. Cable/MMDS Cross-Ownership Restriction

97. Comments. Commenters generally support use of the existing cable/MMDs cross-ownership rules to implement the cross-ownership provision of the 1992 Act. Several commenters assert, however, that the FCC must clarify that it will retain the existing rural and local programming exceptions in implementing the statutory cross-ownership restriction. Tribune Regional Programming, Inc. ("TRB"), which operates a 24-hour news and public affairs channel in Chicago, argues that the local programming exception to the cross-ownership restriction is essential to foster the development of local and regional programing services.[76] Time Warner maintains that in retaining the local programming exception, the Commission should clarify that locally originated programming includes (1) relevant programming produced elsewhere, as long as it is incorporated into a larger local program; and (2) programming that has aired on local television stations.[77]

98. CR&B indicates that the 1992 Act permits cable/MMDS ownership in unserved portions of the franchise area, whereas the FCC's rules would prohibit such ownership. CR&B therefore, suggests that the FCC modify Section 21.912 of its rules to correspond with the 1992 Act by allowing cable/MMDS cross-ownership in parts of a franchise area not served by the cable operator's cable system.[78]

99. The Joint Rural Telephone Companies ("Joint Rural Companies"), which provide cable service in rural areas, indicate that use of the existing cable/MMDS cross-ownership restriction effectively implements the cross-ownership restriction in the 1992 Act. However, the Joint Rural Companies assert that the FCC should clarify that the existing rural exception in

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76 TRB Comments at 5.

77 Time Warner Comments at 56.

78 CR&B Comments at 31.

21.912(d)(1) exempts rural telephone companies providing cable service under the Section 63.58 rural exception.[79] The Joint Rural Companies also submit that the FCC should clarify that Section 21.912 prohibits the issuance of an MMDS authorization to an existing cable operator for its franchise area, but allows an MMDS licensee to obtain a traditional cable franchise where competition in cable service already exists.[80]

100. In contrast, Cablevision of Texas III, L.P. ("Cablevision of Texas") argues that the Commission should clarify that the common ownership of a cable system and an MMDS or SMATV service is what is prohibited, regardless of the corporate structure of which entity owns which. Cablevision of Texas believes that the existing cable/MMDS cross-ownership rules are at odds with the statutory language.[81] Similarly, GTE Service Corporation ("GTE") notes that the overbuild exception contained in Section 21.912(a) of the existing rules is without counterpart in Section 613 of the Communications Act. GTE states that the new Section 613(a)(2) plainly makes it unlawful for a cable operator to hold an MMDS license in any portion of the franchise area served by that operator's cable system. Accordingly, GTE states that the FCC should amend § 21.912 to comport with the 1992 Act.[82]

101. Discussion. Section 613(a)(2) of the Communications Act prohibits a cable operator from holding an MMDS license in any portion of the franchise area served by that cable operator's cable system. The Commission is authorized, however, to waive the cross-ownership prohibition to ensure that all significant portions of the franchise area are able to obtain video programming. We conclude that our cable/MMDS restriction contained in Section 21.912 of our Rules, with certain additions and modifications, effectively implements the statutory cable/MMDS provision.

102. Section 21.912 prevents a cable company from obtaining an MMDS authorization if any portion of the MMDS protected service area overlaps with the cable system's franchise area. Section 21.912(b) also prohibits a cable operator from leasing MMDS capacity if its franchise area overlaps with the MMDs protected service area. The ownership attribution standards established under Section 21.912 prohibit all financial and business relationships between a cable operator and an MMDS licensee whose franchise area and protected service areas overlap. Certain exceptions are provided under Section 21.912 for unserved rural areas[83] and for the provision of local programming.[84] In addition, Section 21.912 contains an overbuild exception,

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79 47 C.F.R. § 63.58.

80 Joint Rural Companies Comments at 3-6.

81 Cablevision of Texas Comments at 2.

82 GTE Comments at 2.

83 47 C.F.R. § 21.912(d)(1).

84 47 C.F.R. § 21.912(e).

which authorizes cable/MMDS cross-ownership within a franchise area if more than one provider of cable service exists.

103. In order to effect Congressional intent, we must conform Section 21.912 to the statutory cross-ownership prohibition. As a preliminary matter, we note that Section 613(a) prohibits cable/MMDS cross-ownership only in portions of the franchise area served by a cable operator's cable system. Section 21.912, on the other hand, prohibits cable/MMDs cross-ownership throughout the franchise area and the MMDS protected service area if there is any overlap between the two.[85] Thus, we amend Section 21.912 to prohibit cable/MMDS cross-ownership only when the MMDS protected service area overlaps with the portions of the franchise area served by the cable operator's cable system. Congress did not define "areas served by a cable operator's cable system" under Section 613(a)(2). However, this term is defined in the context of the Section 19 program access provisions as "an area actually passed by a cable system and which can be connected for a standard connection fee."[86] Accordingly, we prohibit cable/MMDS cross-ownership only if a cable operator's actual service area overlaps with the MMDS protected service area. This modification will allow greater flexibility in providing multichannel video service in the unserved portions of the cable franchise area.

104. In adopting regulations to implement the statutory cable/MMDS cross-ownership restriction we also adopt an attribution standard that is consistent with the standards adopted by the Commission in the video dialtone context.[87] Thus, in assessing cross-ownership, we will consider a cable operator to have an attributable interest in an MMDS licensee if the cable operator holds five percent or more of the stock of such licensee, regardless of whether such stock is voting or non-voting. We do not adopt a single majority shareholder exception, and all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater regardless of insulation.

105. This attribution standard represents a relaxation of the cable/telephone ("cable/telco") cross-ownership attribution standard, on which the Commission's Section 21.912 attribution rules were originally based. We conclude that to the extent the Commission has modified the underlying cable/telco attribution standards in the Video Dialtone Proceeding, similar changes are appropriate in the context of cable/MMDS cross-ownership. In addition, this more relaxed attribution standard is similar to the attribution criteria applicable to other cable cross-ownership

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85 47 C.F.R. § 21.912(a).

86 See First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359, 3376 ("Program Access Proceeding"); Conference Report at 93.

87 See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266, 7 FCC Rcd 5781 (1992) ("Video Dialtone Proceeding").

rules.[88] We believe that this modest increase in the permitted level of ownership is fully consistent with statutory intent. In fact, the Senate Report suggested that the Commission could employ the broadcast attribution criteria contained in Section 73.3555 (Notes) of its Rules, or such other attribution rules as the Commission deemed appropriate for this purpose.[89]

106. We will retain the Section 21.912(b) prohibition against cable operators leasing MMDS capacity where there is system overlap. Although not required by the Act, we regard this restriction as furthering congressional intent to enhance competition and prevent cable operators from warehousing potential sources of competition. When we adopted this provision in the Wireless Cable Proceeding, we considered the scarcity of microwave spectrum available for wireless cable, and concluded that use of such spectrum by cable operators would preclude its use in furthering the development of wireless cable operations.[90] Nevertheless, consistent with the statutory cross-ownership restriction, we modify Section 21.912(b) to apply only where the MMDS protected service area and the cable operator's actual service area overlap

107. Overbuild Exception. Section 21.912 contains an overbuild exception, pursuant to which the cable/MMDS cross-ownership provision is inapplicable if the cable operator is not the sole provider of cable service in the franchise area. Accordingly, a cable operator is allowed to obtain an MMDS license where there is already another provider of cable service in the franchise area. Likewise an MMDS provider is permitted to obtain a cable franchise to become the second provider of cable service in a franchise area. No similar statutory exception was created under Section 613 the 1992 Act. Moreover, the Commission's waiver authority under Section 613 is limited to situations in which the Commission determines a waiver is necessary to ensure that all significant portions of a franchise area are able to obtain video programming. Since the Section 21.912 overbuild exception appears to conflict with the statutory cable/MMDs cross-ownership ban, and Congress did not specifically provide for such an exception, we conclude that this exception should be eliminated. We note however, that nothing in our interpretation of Section 613 would prevent an MMDS licensee from obtaining a cable franchise which overlapped with the licensee's protected service area, provided there was no overlap between the licensee's MMDS protected service and the cable system's actual service area.

108. Rural Exception. Section 21.912(d)(1) of the Commission's rules establishes a limited rural exception allowing cable operators to obtain an MMDS license to provide service to otherwise unserved rural communities.

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88 The Section 63.54 attribution rules were modified in the Video Dialtone Proceeding to more closely parallel the attribution standards applicable to the cable/broadcast cross-ownership restriction in Section 76.501 of the Commission's Rules. 47 C.F.R.§ 76.501.

89 Senate Report at 80.

90 Report and Order, 5 FCC Rcd at 6417.

This exception is applicable where the protected service area includes a rural area with 2500 or less inhabitants, which is otherwise unserved by wireless cable service.[91] No similar rural exception is established under the 1992 Act. Significantly, we interpret Section 613(a) to prohibit cable/MMDS cross-ownership only to the extent that there is overlap between the actual cable service area and the MMDS protected service area. Thus, cable/MMDS cross-ownership is permitted in the unserved portions of the franchise area, provided there is no overlap with the MMDS protected service area.

109. Although Section 613 allows increased cross-ownership in the unserved portions of the franchise area, several commenters argue that it is essential for the Commission to retain the rural exception in implementing the statutory cross-ownership restriction.[92] Commenters are correct in noting that under the statutory cross-ownership provision there may still be some instances in which a rural exception is necessary to authorize cable/MMDS combinations to provide multichannel video service to unserved rural areas. However, since the Commission is authorized under the statute to waive the statutory cross-ownership restriction to the extent necessary to ensure all significant portions of a franchise area are able to obtain video programming[93], we conclude that such cases should be handled by waiver requests filed pursuant to the special relief procedures set forth in Section 76.7.[94]

110. The Commission will consider such waivers filed by cable operators subject to the same procedural safeguards established under Section 21.912(d)(1) of the existing Rules. The Commission will grant cross-ownership waivers to cable operators seeking to provide service to

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91 The Section 21.912 rural exception is based on the cable/telco rural exemption under Section 63.58 of the Commission's Rules. There is a proceeding currently pending to review whether the definition of a rural community for purposes of this exception should be amended to apply to communities with 10,000 or less inhabitants. <u>See</u> <u>Video Dialtone Proceeding</u>, 7 FCC Rcd at 5851.

92 <u>See e.g.</u> NCTA Comments at 56; Time Warner Comments at 55; National Telephone Cooperative Association Comments at 2-3.

93 Although the statutory provision uses the term "video programming" we believe Congress intended the Commission's waiver authority to include situations in which a waiver is necessary to ensure that all significant portions of the franchise area are able to receive multichannel video programming.

94 47 C.F.R. § 21.912(d)(1). We note that telephone companies providing cable service in rural areas pursuant to the 47 C.F.R. § 63.58 cable/telco cross-ownership rural exemption are considered cable operators for purposes Section 21.912 of our Rules, and would therefore also be eligible for cross-ownership waivers to provide service to otherwise unserved rural areas.

rural areas only if no other MMDS operator desires to provide such service. Cable operators seeking such a waiver, should submit a waiver request to the Commission and file an application for an MMDS license. Applications for MMDS licenses filed by cable operators will be placed on public notice. Only if no wireless cable applicant responds to the notice with a timely filed application, will the Commission waive the cross-ownership restriction and award an MMDS license to a cable operator. We believe that such waiver procedures will be effective in preventing service delays to rural customers, while safeguarding the competitive opportunities of wireless cable providers.

111. Local Programming Exception. Section § 21.912(e) of the Commission's rules contains an exception to the cross-ownership restriction, which allows cable operators to use one MMDS channel in a protected service area to provide locally-produced programming to cable headends. The Commission adopted this exception because we recognized that there were significant public interest benefits in allowing cable operators to use MMDS capacity to provide local programming, not otherwise available within the franchise area. Such an exception furthers the Commission's longstanding goal of enhancing localism, by promoting the establishment of additional outlets for locally-originated programing.[95]

112. Several Commenters argue that the Commission should retain the local programming exception in implementing the statutory cross-ownership restriction. We conclude that the local programming exception is consistent with the statutory cross-ownership restriction and should therefore, be retained. We note that it is Section 21.912 (b) of the Commission's Rules, and not the statutory cross-ownership provision, which prohibits cable operators from leasing MMDS capacity in their franchise area.[96] The 1992 Act only prohibits a cable operator from holding an MMDS license in its actual service area. Consequently, the local programming exception is not at odds with the statutory cross-ownership rule. On the contrary, the local programming exception furthers Congress' objective of preserving localism, which Congress stated was "a primary objective and benefit of our Nation's system of regulation of television broadcasting"[97] Accordingly, we conclude

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[95] Locally-produced programming is defined for this purpose as any programming produced in or near the cable operator's franchise area and not broadcast on a television station available within the franchise area. In the Wireless Cable Proceeding, we indicated that we did not intend for our definition of locally-produced programming to "prohibit the inclusion in locally produced programs of some relevant material or segments produced elsewhere but incorporated into a larger program." We also stated that it was not our intention to preclude the use of any programming, which aired on local television stations. We indicated that "such materials could be included in a locally produced program provided it constituted only a small or minor part of the overall program." Second Report and Order, 6 FCC Rcd at 6799 ("Wireless Cable Proceeding").

[96] 47 C.F.R. § 21.912(b).

[97] 1992 Cable Act, Section 2(a)(10).

that the local programming exception is consistent with statutory objectives and will be retained as it applies to the leasing of MMDS channels.

C. Cable/SMATV Cross-Ownership Restriction

113. Comments. Most commenters generally agree that the Section 21.912 cable/MMDs regulations can be modified to implement the cable/SMATV cross-ownership restriction in the 1992 Act. However, commenters note that there are certain issues unique to the cable/SMATV cross-ownership restriction that must be addressed. Commenters also observe that the Section 21.912 cable/MMDS provisions are technology specific in their application and are thus, inappropriate for purposes of implementing a cable/SMATV cross-ownership restriction. In addition, commenters note that the cable/SMATV restriction only prohibits cable operators from offering SMATV service "separate and apart from any franchised cable service," in the cable service area, in contrast to the cable/MMDS restriction, which prohibits all cable/MMDS cross-ownership in the cable operator's actual service area.

114. Several commenters suggest that the "separate and apart" language is not meant to limit the cross-ownership exception to SMATV services that are physically interconnected with a franchised cable system. According to these commenters, since an interconnected SMATV system is treated as a cable system, and is therefore, already out of the ambit of the cross-ownership restriction, the separate and apart exception cannot be limited to physically interconnected facilities. Instead, these commenters submit that the "separate and apart" exception was intended to exempt SMATV systems that are operated in accordance with the terms of the cable operator's franchise, even though such SMATV systems are not physically interconnected with the cable operator's cable system. Commenters favoring this approach observe that this interpretation is consistent with the fact that the statutory language looks at whether the SMATV service is being offered separate and apart from any franchised cable "service," not cable "system".

115. Other commenters advocate an interpretation that would permit a cable operator to acquire a SMATV system with the intention of physically integrating such system into the overall cable system. The key indicator of integration according to these commenters, should be whether or not programming is delivered through the cable system and not the SMATV system. These commenters argue that a SMATV system, whether constructed or acquired by a cable operator, should not be regarded as separate and apart as long as the cable operator integrates the SMATV system into the cable system within a reasonable time (e.g., six months).

116. Commenters also note that the cross-ownership restriction only applies in those areas of the cable operator's franchise that are actually being served by the cable operator's cable system. Thus, if a cable operator has not wired its entire franchise area, the cross-ownership ban does not prevent the operator from providing SMATV service in the unserved areas. Commenters state that such a qualification is appropriate because extending service by means of SMATV may be the only method of providing service in some parts of the franchise areas.

117. Liberty Cable Company, Inc. ("Liberty"), adds that the cross-ownership restriction should not prevent a SMATV operator from continuing to operate a SMATV service if the SMATV operator obtains a cable franchise to become the second franchised cable operator in the franchise area. According to Liberty, this interpretation is consistent with congressional intent to promote competition for established cable operators. Liberty notes that in New York, where it is the sole competitor of Time Warner Cable, it should not be required to divest its SMATV systems, if it eventually obtains a cable franchise to compete head-to-head with the Time Warner's cable systems.

118. Several commenters submit that the 1992 Act and its legislative history were not intended and should not be interpreted to prevent the common ownership of a SMATV system that itself qualifies as a cable system under Section 602(6) of the Communications Act and a separate stand-alone SMATV system. In contrast, CR&B submits that the Commission should clarify that any SMATV systems that are interconnected through coaxial cable, fiber or other physical connections, that cross the public right of way, are cable systems whose operators may not own a separate stand-alone SMATV system in its franchise area.[98]

119. Discussion. We conclude that while Section 21.912 addresses the same concerns as the cable/SMATV cross-ownership restriction, a separate rule is needed to address issues unique to SMATV service and to the statutory cable/SMATV cross-ownership restriction. As an initial matter, we note that Section 617(a)(2) does not prohibit all cable/SMATV cross-ownership within a cable operator's actual service area. Section 613(a)(2) only prohibits cable operators from providing SMATV service "separate and apart" from the franchised cable service in the portions of the franchise area actually served. Congress did not explain its intent in limiting application of the cross-ownership restriction to SMATV service offered "separate and apart" from franchised cable service.

120. As indicated above, commenters offer various theories regarding the appropriate interpretation of the "separate and apart" language. Many commenters argue that the "separate and apart" language allows a cable operator to build or acquire a SMATV system within its service area, provided such SMATV system is physically integrated with the cable system within a reasonable period of time. Other commenters maintain that the "separate and apart" language does not require physical integration. Instead, these commenters submit that this language was meant to exempt SMATV systems that are operated in accordance with the terms of the cable operator's franchise agreement, regardless of whether such systems are built, acquired, integrated or stand-alone.[99]

121. Our statutory analysis of the "separate and apart" language leads us to a different conclusion. The purpose of the Section 613(a) cross-ownership provision is to encourage alternative providers of multichannel

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98 CR&B Comments at 33.

99 NCTA Comments at 32-33.

video service and to promote the development of local competition for established cable operators.[100] Indeed, the Senate Report found that because of the extraordinary expense of constructing more than one cable television system to serve the same geographic area, most cable subscribers have no opportunity to select among competing systems.[101] The Senate Report observed that without the presence of another multichannel video programming distributor, cable operators face no local competition, which leads to undue market power for existing cable operators.[102] Moreover, the Senate Report indicated that the objective of restricting cross-ownership of different means of video distribution was to ensure that a diversity of voices are available to the public, and to prevent anti-competitive acts that would limit the types of services available.[103]

122. Given Congress' objectives in enacting the cross-ownership restriction, we conclude that a narrower interpretation of the "separate and apart" exception was intended. We interpret this language to permit cable operators to construct stand-alone or integrated SMATV systems for use in providing franchised cable service to subscribers within the cable operator's service area. However, we believe that the language "separate and apart from any franchised cable service," requires that cable-owned SMATV systems be operated in accordance with all terms and conditions of the cable franchise agreement. Thus, cable operators providing SMATV service within the cable service area are required to observe all provisions of the franchise agreement, including any uniform programming, service, and rate requirements provided therein. This limited cross-ownership exception is appropriate, since cable operators frequently use SMATV systems to provide cable service to multiple unit dwellings, such as apartment complexes and hotels, within their franchise area.[104] Such an interpretation is also consistent with the fact that the statutory language looks at whether the SMATV service is being offered separate and apart from any "franchised cable service" not "cable system."

123. While Congress intended to permit some cable/SMATV combinations in the cable service area, we conclude that Congress did not intend to allow cable operators to acquire existing SMATV facilities within the cable operator's actual service area for the purpose of providing cable service. In light of the important statutory objectives of promoting competition and encouraging diverse sources of programming, such acquisitions would undermine the goals of the cross-ownership restriction and eliminate an important potential source of competition for established cable operators. Moreover, we believe that Congress sought to encourage cable operators and SMATV

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100 Senate Report at 46.

101 Id. at 46-47.

102 1992 Cable Act, Section 2(a)(2).

103 Senate Report at 46.

104 Time Warner Comments at 63.

providers to compete directly with one another. In our view, a policy allowing cable operators to acquire existing SMATV facilities, rather than construct their own facilities, would not further this goal and would in fact, thwart the development of a promising competitive technology. Finally, we determine that such a policy would reinforce existing cable monopolies and reduce the competitive opportunities for SMATV providers within the cable service area.[105]

124. For the foregoing reasons, our rules implementing the statutory cable/SMATV cross-ownership restriction prohibit a cable operator from acquiring an ownership interest in a separate SMATV operator providing service within the cable operator's actual service area.[106] Separate SMATV operators are defined under our rules as providers of SMATV service within the cable operator's service area, which were not owned, operated or controlled by, or under common control with the cable operator as of the effective date of the 1992 Act. In implementing the cable/SMATV cross-ownership restriction, we employ the same attribution criteria adopted in connection with cable/MMDS cross-ownership restriction above. Our attribution rules in this context generally attribute all stock interests of five percent or more, whether such stock is voting or nonvoting. In addition, all officer and director positions and general partnership interests shall be attributable, as will limited partnership interests of five percent or greater, regardless of insulation.

125. Commenters addressing the "separate and apart" language unanimously argue that it should not be relevant whether a cable operator constructs or acquires a separate SMATV system, provided the cable operator integrates the SMATV system, or operates such system in accordance with the terms of the cable franchise. NPCA for example, argues that cable operators should be permitted to acquire separately-owned SMATV systems in their cable service area, provided such systems are operated in accordance with the terms of the cable franchise.[107] NPCA maintains that such an interpretation is essential to preserve the "exit strategies" available to SMATV operators, and

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105 The Commission similarly prohibits local telephone companies from acquiring existing cable facilities to provide video dialtone service. Telephone companies seeking to provide such video dialtone service are required to construct their own facilities. See Video Dialtone Report and Order, 7 FCC Rcd at 5835-36.

106 One commenter indicated that such an interpretation had already resulted in fear among building managers that if they enter into contracts with SMATV operators, they would subsequently be prohibited from allowing a franchised cable operator to take over the system should it become necessary or desirable. See National Private Cable Association ("NPCA") Comments at 12. We note that our rules prohibit a cable operator from acquiring a separate SMATV system. However, where a SMATV contract has been terminated by either party, we would not prohibit a cable operator from providing cable service over preexisting facilities.

107 NPCA Comments at 11.

to encourage continued investment in the development of SMATV systems. NPCA acknowledges that such an interpretation may seem to undercut Congress' competitive goals since "one competitor is leaving the marketplace by selling out to another, thus, lessening competition."[108] However, NPCA asserts that the SMATV's departure in these circumstances is inevitable, and thus, Congress' objectives are best served by leaving reasonable exit strategies available to SMATV investors.

126. We are not persuaded by these arguments. We note that all ownership restrictions limit the "potential exit strategies" of investors in the affected services. Nevertheless, alternative exit strategies have proved sufficient to allow affected industries to develop and attract investors. Similarly, SMATV investors considering exit strategies will have numerous alternatives available. Our Rules would not prevent the sale of a SMATV system to building management, another SMATV operator, an MMDS operator, or a cable operator franchised in a community in which the SMATV system does not provide service.

127. Finally, as described above, the 1992 Act only prevents cable/SMATV cross-ownership in those areas of the cable operator's franchise that are served by the cable operator's cable system. Thus, if a cable operator has not wired its entire franchise area, the cross-ownership ban does not prevent the operator from building or acquiring a stand-alone SMATV system. However, the Commission concludes that such cable-owned SMATV systems must be operated in accordance with the terms of the cable franchise agreement. We conclude that in order to protect the competitive opportunities of independent SMATV operators, it is essential that we limit the ability of cable operators to use SMATV technology in their franchise area to provide programming services other than the franchised cable service.

128. In addition, consistent with congressional intent, our regulations do not prevent the common ownership of a SMATV system that itself qualifies as a cable system under Section 602(7)(B) of the Communications Act, and a separate stand-alone SMATV system that is within the same service area.[109] We also do not consider a SMATV system that qualifies as a cable system to be subject to the statutory cable/MMDs cross-ownership restriction. Thus, common ownership of a SMATV system and an MMDS facility with overlapping service areas would not prohibited under the Commission's rules. Since Congress intended Section 613 to encourage competition for traditional cable systems, it would be contrary to the statutory objective to prevent the common ownership of more than one SMATV system in a franchise area simply because one of the SMATV systems serves non-community owned multiple dwellings or serves community-owned multiple dwellings and crosses a public right of way.

129. Liberty argues that the cross-ownership provision should not prevent a SMATV operator from continuing to provide SMATV service if the

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108 Id.

109 Senate Report at 81.

SMATV operator obtains a cable franchise to become the second franchised cable operator in a community. Liberty suggests that the cable/SMATV cross-ownership prohibition should apply only in areas where there is one cable franchisee. As we indicated above with respect to the cable/MMDs cross-ownership, no overbuild exception was provided under the statutory cross-ownership restriction and the Commission's waiver authority is very narrow. Consequently, we conclude that the statutory language prohibits the Commission from adopting an overbuild exception in this context. We note, however, that Section 613 would generally not prevent a SMATV operator from obtaining a cable franchise in the same area served by the operator's SMATV service, provided the SMATV operator began operating the SMATV system in accordance with the terms and conditions of the cable franchise agreement.

D. Enforcement

130. Comments. Commenters unanimously oppose the establishment of specific reporting requirements to enforce the cross-ownership restrictions. Commenters indicate that the cross-ownership restrictions should be enforced on a complaint only basis.

131. Discussion. As we indicated in the Notice, we do not consider it necessary at this time to establish additional reporting requirements in connection with the MMDS or SMATV cross-ownership restrictions. The Commission's existing rules require applicants for MMDS licenses to show that no portion of the facility's protected service area will overlap with the franchise area of an affiliated cable operator.[110] As required under the statute, we will amend this rule to require that applicants show that the protected service area will not overlap with any portion of the franchise area actually served by an affiliated cable operator's cable system. However, the Commission will not adopt specific reporting requirements at this time for cable/SMATV cross-ownership. Instead, the Commission will enforce these cross-ownership rules on a complaint basis. Complaints regarding cross-ownership violations should be filed with the Commission pursuant to the procedures set forth in Section 76.9. of our Rules.

IV. SUBSCRIBER LIMITS

A. Background

132. The 1992 Cable Act requires the Commission to establish horizontal ownership limits. Specifically, Section 11(c)(2) of the 1992 Cable Act requires the Commission to place limits on the number of subscribers an entity can reach through cable systems owned by that entity.[111] The establishment of these "subscriber limits" is intended to address Congress'

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110 47 C.F.R. § 21.912(c).

111 47 U.S.C. § 533(f)(1)(A).

concern regarding increasing horizontal concentration in the cable industry. Congress found that increased concentration in the cable industry had the potential to create barriers to entry for new programmers and to reduce the number of media voices available to consumers.[112]

133. In establishing the ownership limits mandated by Section 11, the 1992 Cable Act directs the Commission to consider the following public interest objectives of the legislation: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of unaffiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to ensure that such rules and regulations reflect the dynamic nature of the communications marketplace; (F) to impose limitations that will not prevent cable operators from serving previously unserved rural areas; and (G) to impose limitations that will not impair the development of diverse and high quality programming.[113]

134. Proposal. Before imposing definitive horizontal ownership restraints on the cable industry, we want to be certain that in so doing we have struck the proper balance among the competing public interest objectives Congress directed us to consider. Our review of the comments in response to the Notice has persuaded us that further comment on a number of matters is necessary before we can establish appropriate subscriber limits. However, the record to date has helped us to form certain tentative conclusions. Therefore, at this time, we seek further comment on our proposals regarding the appropriate threshold and application of the subscriber limits. In brief, we propose to adopt a national subscriber limit of 25% of homes passed and to attribute cable system ownership based on the same criteria that is used in the broadcast context.[114] However, we continue to seek comment on establishing subscriber limits in the range of 20% to 35% of homes passed nationwide. In addition, we propose to permit ownership of additional cable systems, beyond the 25% limit, if such systems are minority-controlled.

B. Applicable Market.

135. Notice. In the Notice we asked commenters to indicate whether

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112 1992 Cable Act, Section 2(a)(4).

113 47 U.S.C. § 533(f)(2). Congress intended these public interest considerations to apply to all ownership limits mandated by Section 11(c)(2), including the channel occupancy limits discussed infra.

114 47 C.F.R. 73.3555 (Notes).

regional or national subscriber limits, or both, were necessary to implement the objectives of the 1992 Cable Act. We noted that while the legislative history of the 1992 Cable Act focused on national subscriber limits, it also discussed regional concentration. Additionally, we cited findings from the 1990 Cable Report, concluding that the level of national concentration in the cable industry did not warrant regulatory intervention, but indicating that regional concentration could lead to MSOs engaging in anti-competitive behavior on a regional basis without disrupting national markets.

136. Comments. Cable commenters addressing the issue of whether subscriber limits should apply to national and/or regional markets all favor establishing only national subscriber limits. Several cable commenters argue that the Commission lacks the authority to promulgate regional limits under the 1992 Cable Act. Additionally, they believe that national limits best serve the objectives of the 1992 Cable Act since most programming distribution occurs on a national, not a regional, basis. Also, these parties contend that regional limits would threaten the marketplace efficiencies afforded by regional concentration, such as expanded customer service and increased local programming.[115] Only INTV supports imposing regional subscriber limits, arguing that such limits are necessary to curb the anti-competitive power of MSOs in local advertising markets.[116] INTV would have the Commission prohibit a single cable operator from reaching more than 50% of the homes passed in a local market (as defined by Arbitron's Area of Dominant Influence or ADI).[117]

137. Discussion. We propose to adopt exclusively national subscriber limits. We agree with the majority of commenters who conclude that national subscriber limits best serve the objectives of the 1992 Cable Act because most programming distribution occurs on a national, not a regional basis. We are also concerned that the imposition of regional limits may sacrifice many of the benefits and marketplace efficiencies associated with regional concentration, such as investment in the deployment of fiber optic cable, development of local and regional cable programming and improved customer service. Moreover, we are cognizant that denying cable operators the benefits of regional concentration could impede their ability to become competitors of local telephone companies.

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115 See, e.g., TCI Comments at 27-28; Time Warner reply Comments at 2-5; NCTA Reply Comments at 5-6.

116 INTV contends that in markets with only one cable operator, that operator is the conduit for all local advertising and therefore is in the position to dictate local advertising prices, which places other local media (e.g., TV stations) at a considerable disadvantage. INTV Comments at 7-8. In response, cable commenters argue INTV's assertions are disingenuous since data shows that broadcast stations continue to control an overwhelming share of the local advertising market as compared to cable interests. See TCI Reply Comments at 19-20; NCTA Reply Comments at 12-13.

117 INTV Comments at 8.

138. Commenters are asked to indicate whether the proposed national subscriber limits would suffice to implement the objectives of the 1992 Cable Act. In addition, we would like commenters to consider whether the benefits of regional concentration outweigh the possible anti-competitive harm that such concentration may have on the local advertising and programming marketplace. Finally, we are concerned that if we impose regional limits, other multichannel video distributors may not be available to serve unserved subscribers in all communities. We ask commenters to address this issue as well.

C. Measurement and Percentage Limitation.

139. Notice. The Notice sought comment on the measure that should be used to implement subscriber limits. We indicated that subscriber limits could be defined either as a share of cable subscribers or as a share of homes passed. However, after consideration of the two standards, the Notice proposed adoption of a homes passed measure. We tentatively concluded that while a subscriber-based standard is the more traditional measure, a homes passed standard is more appropriate because: (1) it encompasses all television households for which a particular cable operator provides access to cable programming; (2) it is more stable than a subscriber-based limit; and (3) it encourages the addition of new subscribers.

140. The Notice also asked commenters to indicate what percentage of homes passed nationally would constitute a reasonable limit on horizontal concentration. Specifically, we proposed a limit in the range of 25% to 35% of homes passed and asked a series of other questions designed to discern the level of subscribership needed to successfully launch new cable programming services. We also questioned whether the audience reach limits of the broadcast multiple ownership or network-cable cross-ownership rules were relevant to determining subscriber limits in this proceeding.[118] Furthermore, we observed that the Senate Report suggests that Section 11 was not intended to require divestiture by any existing MSO. The Notice also invited comment on whether we should establish a minority ownership incentive similar to the one used in the broadcast context, which provides for increased ownership of broadcast stations representing up to 30% of the television households nationwide if such additional stations are minority controlled.[119]

141. Comments. Most commenters addressing the issue of how to calculate subscriber limits, favor measuring the audience reach of cable systems by a homes passed standard rather than a subscriber-based standard.

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118 The Commission's broadcast multiple ownership rules limit the audience reach of television stations in which a single entity can hold an attributable interest to 25% of television households nationwide. See 47 C.F.R. § 73.3555. The network-cable cross-ownership rule provides that national television networks can own cable systems which reach 10% of the homes passed nationally. See 47 C.F.R. § 76.501.

119 See 47 C.F.R. § 73.3555(d).

For example, Liberty Media, NATOA, MPAA, INTV and TCI all agree that a homes passed standard is more appropriate because a measure based on the number of subscribers is unstable and may have the effect of discouraging subscriber growth.[120] NCTA supports a homes passed standard too, but also believes the standard should reflect the fact that cable operators facing "effective competition" are unable to impede the flow of programming. NCTA therefore suggests subtracting from the number of homes passed all households that are also passed by a competing distribution service.[121] Only Intermedia favors a subscriber-based measure for determining the size of a cable operation, arguing that a subscriber-based measure is more accurate and is necessary to determine whether there is effective competition.[122]

142. Time Warner and GTE advocate the use of alternative measures. Time Warner suggests calculating subscriber limits by measuring the cable operator's share of subscribers who have access to programming either by means of cable or through other multichannel video distributors.[123] According to Time Warner, this approach would provide a truer measure of an operator's ability to impede the flow of video programming than would any measure based solely on cable subscribership or cable homes passed. GTE proposes another approach that would determine the audience reach of a cable operator based on its "total franchise area homes." According to GTE, substantial portions of existing cable franchise areas are not wired and therefore cannot pass all homes that are authorized to receive service. Consequently, GTE believes a measure based on the entire cable franchise service area -- even if part of the area is not wired -- would encourage operators to expand service into unbuilt areas.[124]

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120 See Liberty Media Comments at 32; NATOA Comments at 20; Discovery Comments at 8-9; MPAA Comments at 6; INTV Comments at 4; TCI Comments at 28-29.

121 NCTA Comments at 15. Alternatively, NCTA would have the Commission measure a cable operator's size as a percentage of the number of subscribers served not just by cable systems, but by other distribution technologies as well. Id. at 15 n.31.

122 Intermedia Comments at 9.

123 Time Warner would make this determination based on a percentage that has, (a) as its numerator, the number of cable subscribers served by the cable operator in question, and that has, (b) as its denominator, the sum of (i) the number of all cable subscribers nationally and (ii) the number of subscribers to other multichannel video programming distributors. Time Warner Comments at 18-19.

124 GTE Comments at 2. In its reply comments, Time Warner opposes GTE's suggested approach, arguing its would not accurately reflect an operator's ability to impede the flow of programming, which was Congress' concern in enacting the statute. Time Warner argues that where an operator has not laid cable, it can do nothing to prevent others from providing service. Moreover, Time Warner points out that unbuilt areas provide opportunities for alternative distributors such as SMATV, MDS and MMDS.

143. On the issue of establishing a reasonable limit on horizontal concentration, cable commenters generally support a subscriber limit of approximately 40% of homes passed nationally.[125] Relying on marketplace experience, antitrust principles and other factors, these commenters contend that there is no basis on which to conclude that an MSO with a 40% market share can impede the success of new programming services. They urge the Commission to avoid strict horizontal ownership limits that could preclude the efficiencies and benefits that result from continued horizontal growth.[126] Furthermore, they believe that Congress did not intend for the Commission to impose limits that would force existing MSOs to divest.[127]

144. In support of their position that a 40% subscriber limit is reasonable, cable commenters argue that extensive subscriber penetration is not essential to the success of a new programming network. Time Warner, TCI and NCTA contend that many program services have flourished at subscriber

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Time Warner Reply Comments at 8-10

125 Discovery advocates setting subscriber limits at a level considerably higher than the present degree of horizontal concentration. According to Discovery, the Commission can determine at what percentage a cable operator may effectively preclude the success of a new cable service by identifying the penetration level that an alternative technology distributor needs to survive. Discovery points out that Congress defined "effective competition" in Section 3 of the 1992 Cable Act in terms of at least two unaffiliated distributors both of which have a subscriber base of more than 15% of the households passed. Thus, Discovery indicates that under Congress' own definition, effective competition can exist even when one operator has 85% penetration. Discovery Comments at 7-9.

126 For example, Discovery states that if the Commission adopts strict subscriber limits, the impact would be to sharply reduce the revenues of the programmers carried by large MSOs, which could threaten the survival of many programming networks. Discovery Comments at 5-6. TCI also submitted a study concluding that strict limits on horizontal ownership could diminish the quality, quantity and diversity of available programming. TCI Comments at 15-17. See also Besen, et al., "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions" (filed Feb. 9, 1993) ("Besen Study") (attachment to TCI Comments). The Besen Study finds that the aggregation of subscribership does not harm consumers because cable systems do not compete directly against one another. According to Besen, while a large subscriber base may increase the bargaining power of an MSO in dealing with program suppliers, it does not affect the diversity of programming selected and distributed or distort the allocation of resources to the production of programming. Besen Study at 22.

127 See, e.g., Time Warner Reply Comments at 11-14.

penetration levels well below 60%.[128] Time Warner provides examples of several successful program services that began with low penetration levels and which gradually gained audience share as their product improved or their popularity grew.[129] Cable commenters also observe that many factors determine the level of audience penetration necessary to make a new program service an economic success, including the degree to which a service is supported by subscriber fees versus advertising revenues and the type of programming service involved.[130] Finally, cable commenters rely on antitrust principles, arguing that a single firm cannot exercise monopoly power with less than 50% of the relevant market.[131]

145. In contrast to the cable commenters, MPAA advocates a 25% subscriber limit, which would effectively cap the largest MSO at its present level of concentration.[132] MPAA does not believe Congress intended for subscriber limits to be set above existing levels of horizontal concentration since it was existing levels of market power that prompted

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[128] These commenters note that program networks such as Black Entertainment Television ("BET"), The Learning Channel, Bravo and Court TV have had great success with penetration levels of less than 30% to 40%. Time Warner Comments at 28-29; TCI Comments at 24-25; NCTA Comments at 16.

[129] Time Warner Comments at 27-28. For example, Time Warner notes that The Family Channel, which was launched in 1977 achieved less than 10% penetration of all cable homes by its second year of operation, achieved only 22.1% in its third year, but approached 60% penetration by its sixth year of carriage. Another example provided by Time Warner is Nickelodeon, which achieved only 15.1% penetration in its second year of operation and now enjoys over 90% penetration. Id.

[130] See, e.g., NCTA Comments at 17. Time Warner, for example, points out that a service that emphasizes license fees as a source of revenue may need less penetration than will a service that is primarily dependent upon advertising revenues. Additionally, Time Warner notes that the cost structure of the service will determine the revenue level (and will thus influence the degree of penetration) that the service must reach to achieve profitability. Thus, a service that offers relatively expensive programming (e.g., recently released theatrical motion pictures) will have a higher cost structure, and will need to achieve greater revenues, than will a service that depends upon less expensive programming (e.g., news and syndicated TV programs). Time Warner Comments at 25-26.

[131] NCTA Comments at 17; TCI Comments at 19-23; Time Warner at 21-23.

[132] MPAA conditions its support for a 25% subscriber cap on the Commission adopting reasonable program access, leased access and attribution requirements. Otherwise, MPAA states that it advocates a limit lower than 25%. MPAA Comments at 5. NATOA also advocates a 25% subscriber cap. NATOA Comments at 19. NATOA believes that for the Commission to adequately correct the market aberrations caused by the anti-competitive practices of current MSOs, such MSOS should be required to divest current holdings. Id.

Congress to take action. MPAA also challenges the use of traditional antitrust market concentration measures as a basis for adopting a 40% subscriber cap. According to MPAA, such antitrust measures are not an accurate determinant of MSO market power because most cable systems do not compete with one another in the program acquisition market. MPAA also challenges the contentions of several cable commenters that a 40% cap is reasonable because new program services can survive with less than 60% penetration of cable households. MPAA believes its proposed 25% subscriber cap is liberal enough since if more than one operator approaches the 25% concentration figure, an independent programmer may have its market access limited to only 50% of homes passed.[133]

146. Only INTV advocates a subscriber limit lower than that proposed in the Notice.[134] Specifically, INTV believes a subscriber cap of no more than 10% is appropriate.[135] INTV calls for stricter horizontal ownership controls than are used in the broadcast context. According to INTV, such strict limits are necessary because cable operators (unlike broadcasters) face little or no competition in the local marketplace. INTV argues that its proposal is consistent with the intent of Congress to enact regulations that do not allow the status quo to prevail.[136]

147. Discussion. In adopting horizontal ownership limits we seek to balance Congress' concerns regarding the ability of the largest MSOs to preclude the launch of new programming services with the benefits to consumers that result from some degree of horizontal concentration. Consequently, we propose to adopt a horizontal ownership limit prohibiting

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133 MPAA Reply Comments at 2-4.

134 However, David Waterman of the Annenberg School for Communications submitted a study suggesting that MSOs with less than 25% of the homes passed nationally may still be able to unduly influence the programming acquisition market. See Waterman Comments at 3 and Waterman, "Local Monopsony and Free Riders In Information Industries" (filed Feb. 9, 1993) (Waterman Study) (attachment to Waterman Comments). Time Warner and other commenters challenged Waterman's conclusions, charging that his study erroneously assumes that cable programming networks need to reach all cable subscribers and that cable networks primarily offer original programming. See, e.g. Time Warner Reply Comments at 14-16.

135 Recognizing that its proposal would force divestiture of existing MSOs, INTV suggests applying the 10% cap prospectively. INTV Comments at 7.

136 Time Warner, Liberty Media, TCI and NCTA all criticize INTV's proposed subscriber limit. TCI, for example, argues that a 10% cap is at odds with Congressional intent, since such a strict standard would impair development of diverse and high quality video programming. TCI Reply Comments at 17. NCTA argues that a 10% limit would be "absurd," and claims that INTV fails to acknowledge Congressional findings regarding the benefits of horizontal concentration (i.e., efficiencies in administration, distribution and procurement of programming). NCTA Reply Comments at 11.